

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

\* \* \* \* \*

DAKOTANS FOR HEALTH,  
RICK WEILAND, ADAM  
WEILAND,

Plaintiffs,

-vs-

BOB EWING, BRANDON  
FLANAGAN, RANDY DEIBERT,  
RICHARD SLEEP, ERIC  
JENNINGS, LAWRENCE  
COUNTY COMMISSIONERS,

Defendants.

DOCKET NO.  
5:23-cv-5042-RAL

Rapid City, South Dakota  
Courtroom 1

July 3, 2024  
10:58 a.m.

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TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE ROBERTO A. LANGE  
UNITED STATES DISTRICT JUDGE

\* \* \* \* \*

APPEARANCES:

For the Plaintiff: JAMES D. LEACH  
1617 Sheridan Lake Road  
Rapid City, SD 57702

For the Defendant: RICHARD M. WILLIAMS  
Gunderson, Palmer, Nelson &  
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506 Sixth Street  
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1 (Proceedings in open court at 10:58 a.m.)

2 THE COURT: Good morning, everyone. The Court  
3 is on the record in the case of Dakotans for Health, Rick  
4 Weiland, and Adam Weiland versus Bob Ewing, Brandon  
5 Flanagan, Randy Deibert, Richard Sleep, and Eric Jennings in  
6 their official capacities as Lawrence County commissioners.

7 Will plaintiffs' attorney please notice appearance.

8 MR. LEACH: Your Honor, Jim Leach for plaintiffs.  
9 I've been advised to remain seated, so I'm fighting every bone  
10 in my body that wants to stand up when I talk to you.

11 THE COURT: Right. Do please remain seated  
12 throughout the hearing. It does assist the court reporter, who  
13 is appearing remotely, to capture everything that was said.

14 Good morning, Mr. Leach.

15 Mr. Williams, will counsel for defendants please  
16 notice appearance.

17 MR. WILLIAMS: Good morning, Your Honor.  
18 Richard Williams for defendants in this matter. I'm here today  
19 with Ben Titus. Ben is a summer associate with our office.  
20 For some reason we called them that. Everyone else would  
21 know them as summer interns.

22 THE COURT: Welcome, Mr. Titus.

23 MR. TITUS: Thank you.

24 THE COURT: For what it's worth, I've had three  
25 different summers where I've worked as a summer intern.

1 Each firm called us summer associates. That was in Chicago,  
2 New York, and in Minneapolis. At the firm that I practiced at  
3 for 20 years, I would have just called them summer  
4 associates. I think that's more appropriate than interns.

5 At any rate, the Court is somewhat torn on what to  
6 do with the pending motion for attorney's fees filed by the  
7 plaintiffs. And to somewhat frame where the Court has been,  
8 you know, intellectually with this, I'm not hung up on the  
9 hourly rate -- Mr. Leach is an outstanding attorney -- or the  
10 overall amount claimed. My initial reaction was, sure. The  
11 plaintiffs are the prevailing party here, after all. They received  
12 a temporary restraining order, which was voluntarily then  
13 extended by consent of the parties, and even beyond the point  
14 where a temporary restraining order would have to expire, and  
15 the defendants made a policy change that the plaintiffs were  
16 seeking.

17 I think what was in my thinking was basically the  
18 catalyst theory that the *Buckhannon* case from the Supreme  
19 Court rejected; you know, the natural thought, well, the  
20 catalyst for the change in the policy was the lawsuit and the  
21 plaintiffs' position. So initially that was my approach. And  
22 then I got to reading a bit more. And while it's possible to find  
23 a case outside of the Eighth Circuit where the entry of a  
24 temporary restraining order is deemed to be a trigger for  
25 attorney's fees under § 1988 as having some judicial

1 imprimatur that changes a relationship of the parties, there  
2 doesn't appear to be any authority from the Eighth Circuit  
3 endorsing that approach.

4 So what I wanted to do is hear from very capable  
5 counsel from both sides here in Mr. Leach and Mr. Williams  
6 argument on whether what occurred -- the Temporary  
7 Restraining Order entered the day after the case was assigned  
8 to me, two days after it was started -- and I guess what trailed  
9 after that renders the plaintiffs the prevailing party for  
10 purposes of § 1988, recovery of attorney's fees.

11 Mr. Leach, I'll hear from you first. And please  
12 remain seated as you address that issue.

13 MR. LEACH: We know from *Buckhannon* that the  
14 critical issue is whether there is a materially sanctioned  
15 judicial alteration in the relationship of the parties. If I were  
16 to say those words in the right order, it would be judicially  
17 sanctioned material alteration.

18 Well, we know that there was a judicially sanctioned  
19 alteration. That was your order. We know that it was  
20 material because it completely overturned existing practice  
21 and required the defendants to let petition circulators stand  
22 right in front of the courthouse.

23 THE COURT: I think the Annex building.

24 MR. LEACH: Annex building. That's what I should  
25 have said. Right in front of the Annex building instead of

1 being confined to the little square in the middle where they  
2 had been confined. So we did have a judicially sanctioned  
3 material alteration, completely unlike all those TRO cases that  
4 only preserve the status quo. And, in fact, the *Northern*  
5 *Cheyenne Tribe v. Jackson* case that went to the Eighth  
6 Circuit, that was my case, and I lost that one because all I had  
7 got was a preservation of the status quo with no judicially  
8 sanctioned material alteration. But here we have that.

9 And so the question about a temporary restraining  
10 order raised by the defendants -- they can cite a whole lot of  
11 cases that say that, well, a temporary restraining order is not  
12 sufficient. But when you look at those cases, all the ones I  
13 looked at just involved maintaining the status quo with no  
14 material alteration, exactly the opposite of what we had here.

15 And so in this case we do have the judicially  
16 sanctioned material alteration, without question.

17 THE COURT: What do you make, Mr. Leach, of the  
18 Eighth Circuit case of *Rogers Group* decided in 2012, which  
19 would be after *Buckhannon* and *Sole*, that borrows a  
20 three-core-principles approach from the DC Circuit case of  
21 *Select Milk Producers*, where what you've addressed is really  
22 just the first element of this three-core principles, which is *to*  
23 *be a prevailing party a claimant must show that there has been*  
24 *a court-ordered change in the legal relationship between the*  
25 *plaintiff and the defendant.* There then are two other, I guess,

1 principles that the Eighth Circuit, quoting *Select Milk*  
2 *Producers*, states, which is, *second, a prevailing party is a*  
3 *party in whose favor a judgment is rendered, regardless of the*  
4 *amount of damages awarded.* That's awkward here. A  
5 temporary restraining order isn't a judgment. It's an ex parte  
6 order that's temporary in nature. *And, third, a claimant is not*  
7 *a prevailing party merely by virtue of having acquired a judicial*  
8 *pronouncement unaccompanied by judicial relief.* So a  
9 temporary restraining order -- I don't know if that qualifies as  
10 a judicial pronouncement or if here, in context, it provided  
11 judicial relief. I think initially it's a pronouncement, but  
12 effectively it became the judicial relief here.

13 So how do you deal with those three core principles  
14 that the Eighth Circuit borrowed in its decision of *Rogers*  
15 *Group*?

16 MR. LEACH: Right. Well, if I hear you correctly,  
17 you're not concerned about the first one.

18 THE COURT: Well, you've addressed the first one.

19 MR. LEACH: Okay. So let me speak to the third  
20 one. There was alteration. There was relief. There was the  
21 Court's order, because we know before the Court's order  
22 Lawrence County had its policy, and after the Court's order it  
23 had the policy we wanted.

24 So there were two words you used on the third  
25 principle.

1 THE COURT: I'll just quote *Select Milk Producers*.  
2 And this is in the body of the *Rogers Group* Eighth Circuit  
3 decision. *Third, a claimant is not a prevailing party merely by*  
4 *virtue of having acquired a judicial pronouncement*  
5 *unaccompanied by judicial relief.*

6 MR. LEACH: Right. Your order was our relief. That  
7 was everything we wanted. That's why we came to court.  
8 That's why we did everything we did. And we accomplished  
9 that.

10 And I want to -- go ahead.

11 THE COURT: What about the fact that a temporary  
12 restraining order is ex parte? It's entered based on a verified  
13 complaint or affidavit submitted from the moving party in an  
14 emergency setting without the opportunity for the defendant  
15 to respond. So what about the fact that the Court has to rely  
16 on information in the complaint and affidavit and really isn't  
17 making fact findings? It's preliminary, after all. Less than  
18 preliminary. It's temporary. What about that sort of situation  
19 where the Court may not even know if there's a dispute or a  
20 dispute of fact? Can I get beyond that here?

21 MR. LEACH: Yes. And if all we had here was a  
22 temporary restraining order, I'd say, yes, that qualifies  
23 because it's a judicially sanctioned material alteration. But  
24 we have so much more than that here that your decision need  
25 not rest on that grounds, and I think should not rest on that

1 grounds.

2 As you noted, we have 110 days when actual relief  
3 was in effect. And during that period of time, the defense said  
4 to me, and I said to the Court with a copy to the defense,  
5 *They're agreeing to abide.* In fact, the defendants's words, I  
6 think, were *We will abide by the Temporary Restraining Order.*  
7 *You don't have to have a preliminary injunction hearing.*

8 Because I was pushing the defense attorney at that time,  
9 saying *We need to get this on for hearing so we can turn this*  
10 *into a preliminary injunction or not.*

11 Her response was, *No, no need. We will continue to*  
12 *abide by the Temporary Restraining Order.*

13 So that lasted for 110 days.

14 Plus, even though you never put the words  
15 "Preliminary Injunction" on the front, in my reply brief I've got  
16 the cases from the Eighth Circuit that say that it's not the  
17 label on the front that controls; it's what the actual document  
18 does. And here we know that the TRO is limited to 14 days,  
19 extendable, potentially, for another 14 days. And when  
20 something is in effect as this was, based on the defense  
21 stipulation, for 110 days, that's a preliminary injunction. And  
22 so to the extent there's any concern about whether this was  
23 an appealable order, it absolutely was appealable because, of  
24 course, a preliminary injunction is appealable as a right. So it  
25 was in effect that long as a preliminary injunction as a matter



1 of law, no matter what the name on the front of it was.

2 THE COURT: Is there any authority that once a  
3 temporary restraining order expires by virtue of 14 days  
4 elapsing and then another 14 days elapsing, that when the  
5 parties notify the Court that *No hearing is necessary, we've*  
6 *agreed to abide by the terms of the TRO*, that that renders it a  
7 preliminary injunction?

8 MR. LEACH: Well, I don't know of any case saying  
9 that, but that seems to me just what has been agreed to. I  
10 mean, they're agreeing *We Will Abide By This Order*. And  
11 they're saying *You don't have to go to court and have a*  
12 *preliminary injunction hearing*. And so that makes it a  
13 preliminary injunction as a matter of law, regardless of the  
14 name on it.

15 THE COURT: I find that an interesting argument.  
16 I'm trying to think of what happens if they -- this obviously  
17 didn't occur -- but say a month into the case they were to  
18 again provide your petition circulator with the policy and  
19 direct the petition circulator to the restricted zone kind of in  
20 between the two buildings apart from the sidewalks. My  
21 suspicion is you would have come in again with another  
22 motion for temporary restraining order rather than some sort  
23 of motion to enforce a preliminary injunction.

24 MR. LEACH: Well, I would have moved to enforce  
25 the existing court order because they had stipulated they

1 would abide by it. And I think that when --

2 THE COURT: Was it a formal stipulation or was it  
3 just kind of an informal notification to the Court? I just don't  
4 recollect.

5 MR. LEACH: It was informal, but I don't think  
6 there's any difference between the two. I mean, if on behalf of  
7 my client I say to the Court *We will do this*, which defense  
8 counsel said in her email, you know, *We will agree to do this*,  
9 *to abide by this*.

10 THE COURT: Did the email get filed, by chance?

11 MR. LEACH: Yes. It was attached to what I  
12 submitted, so the Court had that. I mean, when an attorney  
13 says that, at least in this part of the country, I think we all  
14 rely on it. I don't think that it would have been well taken had  
15 I said to the Court, *Well, I demand a preliminary injunction*  
16 *hearing. Ms. Mann, the defense attorney, wrote me this email*  
17 *saying she will abide by the Temporary Restraining Order, but I*  
18 *don't trust her. I don't believe her. I have my rights, and I have*  
19 *a right to a preliminary injunction hearing. And I think the*  
20 *Court would have probably looked at me like, you know, I've*  
21 *lost my mind, because I think that's how we all would look at*  
22 *an attorney who said that another attorney -- with no grounds*  
23 *to say it -- said that another attorney's word given in writing*  
24 *could not be trusted. And I just don't think that's the kind of*  
25 *system we have, nor should we have it.*

1 But if you were to rule that I lost my attorney's fees  
2 because I neglected to tell the Court that I didn't trust  
3 Ms. Mann and that, et cetera, next time I'm going to demand  
4 my preliminary injunction hearing.

5 THE COURT: I don't want to tether a ruling to that,  
6 obviously. All right.

7 Anything else, Mr. Leach?

8 MR. LEACH: Yeah. I'd like to respond to a couple  
9 other things you mentioned. You said there was no Eighth  
10 Circuit case on temporary restraining order as a ground for  
11 attorney's fees. There is that Nebraska case. I'm not sure if  
12 you mean --

13 THE COURT: The district court case. I meant  
14 Eighth Circuit, as in the United States Court of Appeals for  
15 the Eighth Circuit.

16 MR. LEACH: Yes. In that sense, no, there isn't.

17 But the other subject you brought up I wanted to  
18 address is that second part of *Rogers v. City of Fayetteville*, the  
19 language that says, quote, "*a prevailing party is a party in*  
20 *whose favor a judgment is rendered, regardless of the amount*  
21 *of damages awarded.*" Okay?

22 Well, I got two things to tell you about that. Number  
23 one, I agree: "*a prevailing party is a party in whose favor a*  
24 *judgment is rendered.*" But it does not say a party in whose  
25 favor a judgment is not rendered cannot be a prevailing party.

1 In other words, that's one way to be a prevailing party,  
2 without doubt; but the converse is not also true.

3 THE COURT: Right. I would agree with you that  
4 these are core principles. It's not a three-part test, for  
5 example, that the Eighth Circuit is articulating. And there are  
6 some instances where a preliminary injunction, which isn't  
7 really a final judgment, has been deemed sufficient to justify  
8 an award of attorney's fees. So I do recognize that.

9 MR. LEACH: And just to go on from there on that  
10 same language, "*a prevailing party is a party in whose favor a*  
11 *judgment is rendered.*" Well, even if it said *a party is not*  
12 *prevailing unless a judgment is rendered in that party's favor,*  
13 the effective preliminary injunction, because it was  
14 appealable, is effectively a judgment.

15 For example, when Judge Piersol entered a  
16 preliminary injunction in the SB 180 case, which the cite on it  
17 from the Eighth Circuit was 52 F.3d -- 52 F.4th 381 in 2022.  
18 But when Judge Piersol issued the district court opinion in  
19 that case, the preliminary injunction, it says "judgment,"  
20 issued a judgment for preliminary injunction, because he  
21 knew that the defendants were going to appeal it, so he called  
22 it a judgment. So a preliminary injunction is a judgment. It's  
23 a form of a judgment that's appealable like any other  
24 judgment.

25 THE COURT: Of course the defendants would say

1       *We never got to a preliminary injunction.*

2               MR. LEACH: They definitely would say that, and I  
3 would disagree because -- under the argument you've already  
4 heard.

5               THE COURT: All right. Anything else?

6               MR. LEACH: Nothing else.

7               THE COURT: I'll give you a chance to reply.

8               And I do want to thank both attorneys for  
9 cooperating to schedule this hearing on somewhat short  
10 notice. I just got stymied working on this and thought it  
11 would benefit me to hear from counsel. And I don't mean, by  
12 any measure, to try to increase the attorney's fees involved in  
13 this dispute. It is a unique and confined issue, and I wanted  
14 to see if we could have a hearing when I'm already out here on  
15 other matters.

16              Mr. Williams, argument on behalf of the defendants.  
17 Please remain seated, of course.

18              MR. WILLIAMS: Thank you, Your Honor.

19              May it please the Court and counsel. In researching  
20 this -- and I wanted to address this initially because the Court  
21 brought it up -- I have not found a single case in this entire  
22 country that grants attorney's fees for an ex parte TRO. And I  
23 think this is important because of the ex parte nature of this  
24 TRO.

25              THE COURT: I want to look at *Common Cause*

1       *Georgia v. Georgia*, the Eleventh Circuit case. Because there  
2       there was a temporary restraining order that was entered.  
3       And I'm not -- usually -- well, if Rule 65(b) is being followed, a  
4       temporary restraining order is ex parte. I realize sometimes  
5       the procedure gets a bit muddled, but the Eleventh Circuit in  
6       that *Common Cause* case did affirm a grant of attorney's fees.  
7       And it's a complicated case factually, but there's no doubt  
8       *Common Cause* started out wanting more relief than it ended  
9       up getting; but, nevertheless, the Eleventh Circuit affirmed  
10      because the temporary restraining order marked a change in  
11      the legal relationship between the parties, it altered the  
12      secretary's conduct, the defendants' conduct, and benefited  
13      Common Cause in its members.

14               So I pause, Mr. Williams, because I'm not sure the  
15      Eleventh Circuit case is -- it does seem to be the best case  
16      from an appellate court for the plaintiffs here. Go ahead and  
17      address it.

18               MR. WILLIAMS: Your Honor, what I would say to  
19      that is -- I have that case in front of me. And if you turn to  
20      page 105.

21               THE COURT: I have the case in front of me too.

22               MR. WILLIAMS: It actually indicates the district  
23      court held a hearing on the motion, which is quite a bit  
24      different than ours. And I would -- it's the paragraph that  
25      begins on November 7th, 2018. And into that paragraph it

1 states the district court held a hearing on the motion the next  
2 day. So I think that's a far different creature than what we're  
3 dealing with here today.

4 THE COURT: Do we know if that hearing was ex  
5 parte or not?

6 MR. WILLIAMS: The beginning of that paragraph  
7 talks about expedited discovery, including expedited discovery  
8 and other matters. So that would lead me to believe that there  
9 was a hearing on that TRO.

10 THE COURT: All right. Go ahead.

11 MR. WILLIAMS: So I think, getting back to my  
12 point, I couldn't find one on an ex parte TRO that didn't have  
13 actually a hearing. And this is important because, when you  
14 look at a preliminary injunction compared to an ex parte TRO,  
15 as the Court is well aware, on a preliminary injunction there's  
16 briefing from both sides. You have a hearing, often  
17 evidentiary. You introduce exhibits. You call witnesses. And,  
18 in fact, you're making a decision, frankly, on the merits. And I  
19 have no doubt that a preliminary injunction is appealable. No  
20 doubt in my mind.

21 Temporary restraining order ex parte without notice  
22 is a different creature entirely. It is issued very, very quickly,  
23 as the Court noted, between June 20th, the complaint being  
24 filed, and June 22nd, the TRO being issued.

25 THE COURT: What about Mr. Leach's argument

1 that, while the Court did grant a temporary restraining order,  
2 it was one that didn't, as other TROs do, preserve a status quo  
3 because it effectively enjoined enforcement of a policy that had  
4 about three years of age on it at the time, and it applied the  
5 *Dataphase* factors, the preliminary-injunction-type factors. So  
6 while it's a temporary restraining order, it's also, I think, 17  
7 pages long, and perhaps the writing was on the wall for how  
8 the *Dataphase* factors might sort out. And, above and beyond  
9 that, upon receipt of the Court's Opinion and Temporary  
10 Restraining Order, the defendants initially agreed to renewal  
11 for 14 days, and then, through counsel, agreed that the  
12 Temporary Restraining Order -- I'm not sure if it's right to say  
13 would remain in place, because under Rule 65(b) it really  
14 can't, but that the parties would -- or the defendants would  
15 abide by the terms of the Temporary Restraining Order, at  
16 least for the time being, and no preliminary injunction hearing  
17 need be set. Doesn't that really transform this -- maybe not  
18 into a preliminary injunction, per se, but transform the  
19 temporary restraining order into something greater, something  
20 that did, in fact, alter the relationships between the parties  
21 and provided the relief to the plaintiffs that they were seeking?

22 MR. WILLIAMS: Your Honor, I'll start by addressing  
23 the first part. Again, this was a TRO without notice, without  
24 opportunity for the general safeguards for a preliminary  
25 injunction where you have briefing, you'd have a hearing,



1       you'd have evidence.

2               And then we get to the second part where the Court  
3       did note in its TRO that it was applying the *Dataphase* factors,  
4       but they didn't really apply to a TRO. I think it was doing that  
5       as just a way of seeing its way through this, a way of making  
6       an analogy.

7               And this did not get turned into a preliminary  
8       injunction, specifically based on what the parties talked about  
9       was *We won't violate the terms of the TRO*. Had the parties  
10      wanted to turn this into a permanent injunction or a  
11      preliminary injunction, they certainly could have by  
12      stipulation and by entering that order with the Court. That  
13      was never done.

14              And then we get to sort of the next thing is --

15              THE COURT: Were you ever asked to stipulate to it  
16      becoming a preliminary injunction and respond no? Was  
17      there any discussions of that?

18              MR. WILLIAMS: Your Honor, I'm recently new to  
19      this case, so I wasn't involved in the prior discussions, but not  
20      to my knowledge. Mr. Leach may have other information on  
21      that.

22              And then we get to, okay, you guys did do -- the  
23      defendants did do --

24              THE COURT: I guess I'll ask Mr. Leach this  
25      question.

1                   Doesn't taking that approach have the risk of  
2                   penalizing counsel for trusting the defendants' counsel and  
3                   not forcing the defendants' counsel to stipulate to a  
4                   preliminary injunction to be entered or to appear before the  
5                   Court for a preliminary injunction hearing, in which case the  
6                   defense counsel may say, *Well, we don't* -- I don't know if they  
7                   would have said *We don't oppose a preliminary injunction* or  
8                   what they would have said at that hearing, but they would  
9                   have been put on the spot, certainly, and maybe a little bit  
10                  peevied at Mr. Leach for not trusting them. In other words,  
11                  isn't there kind of a concern here of punishing counsel for  
12                  trusting opposing counsel?

13                  MR. WILLIAMS: I don't know it's punishing. I  
14                  think, from what I heard today, was, *Hey, look, we're not going*  
15                  *to violate the terms of the Temporary Restraining Order.* That is  
16                  a far cry from saying *We'll agree to an entry of a preliminary*  
17                  *injunction.* And it's not difficult for the parties to make that  
18                  stipulation and file that with the Court and then have that be  
19                  the Court's ruling if the Court should so agree.

20                  So I guess if it's what the parties wanted, they  
21                  certainly could have done that. They did not. They agreed to  
22                  abide by the terms of the TRO.

23                  And then we get to, *Okay, well, you followed -- you*  
24                  *did what we wanted.* Of course that goes back to *Buckhannon*  
25                  that says voluntary cessation alone is not enough for the

1 imposition of attorney's fees.

2 THE COURT: Right. It requires a judicial  
3 imprimatur.

4 MR. WILLIAMS: Yeah. And the judicial imprimatur  
5 here is not -- there is not one. A temporary restraining order  
6 is not an appealable order. It doesn't fall into what you saw in  
7 *Rogers*. It doesn't fall into the language from *Buckhannon* that  
8 stated *These decisions, taken together, establish that*  
9 *enforceable judgments on the merits and court-ordered consent*  
10 *decrees create the material alteration of the legal relationships*  
11 *of the parties necessary to prevent an award of attorney's fees.*

12 And as outlined in our brief, a TRO, ex parte TRO, is  
13 not really a decision on the merits. It's not appealable. It's  
14 not a judgment. And secondarily, as the Court notes in its  
15 opinion and order on it, there are other facts that this Court  
16 may have liked to hear at a preliminary injunction.

17 THE COURT: Was there ultimately any dispute  
18 about -- well, obviously the policy was adopted, I think, in  
19 year 2020, if I recollect right. Was there any dispute about  
20 the policy was given to this petition circulator to trigger the  
21 lawsuit? Was that ever genuinely a dispute?

22 MR. WILLIAMS: Your Honor, I don't think there was  
23 any facial dispute that the policy was as how the policy read.

24 THE COURT: And that the policy was given to some  
25 petition circulator.

1 MR. WILLIAMS: I don't think that's disputed.

2 THE COURT: Okay. All right.

3 MR. WILLIAMS: So basically we get back to what  
4 the Court initially raised is that, you know, there is no -- and  
5 we talk about the Eleventh Circuit, that being different than  
6 there being a hearing in that. Even outside the Eighth Circuit,  
7 I could not find a case that allowed the grant of attorney's fees  
8 on a ex parte TRO. And it's for those very reasons. A  
9 preliminary injunction, sure, and that's in the *Cheyenne River*  
10 the Court even said --

11 THE COURT: I've got to say, I didn't read the  
12 District of Nebraska case. It's obviously not binding  
13 precedent. It's persuasive. Was that an ex parte TRO that  
14 was involved in that case?

15 MR. WILLIAMS: It wasn't, Your Honor. In fact, on  
16 page -- it's an unpublished decision -- but on page -- I've got  
17 the asterisks 4. She received a victory via a stipulated  
18 temporary restraining order in that matter. So it was not, in  
19 fact, a TRO, ex parte TRO. The parties, in fact, agreed to  
20 stipulate that. Whether, of course, that -- whether that  
21 opinion is --

22 THE COURT: Well, could we say here there's a  
23 stipulated TRO in that it was by agreement that the TRO  
24 extend another 14 days?

25 MR. WILLIAMS: I would say that that's probably not

1 right, Your Honor. The judicial imprimatur in this case was  
2 the Court's granting of the ex parte TRO. And the defense  
3 simply said *We're not going to violate that, and so there's no*  
4 *reason for you to go forward at this point.* But, again, at that  
5 point it was saying *We're not going to violate a TRO*, and then,  
6 okay, the plaintiffs moved to move the case based on the  
7 voluntary cessation of the policy. And, again, voluntary  
8 cessation has been long overruled as being a justification for  
9 the implication of attorney's fees.

10 THE COURT: Right. It can't be just it's the catalyst  
11 alone under *Buckhannon*.

12 MR. WILLIAMS: They reject the catalyst theory.

13 So we get back to, you know, at the end of the day,  
14 we're just sitting here with an ex parte TRO for which the  
15 protections of a preliminary injunction aren't in place, which  
16 would include, you know, crossbriefing, again, Your Honor,  
17 the hearing, the evidence, and the witnesses. So it's pretty  
18 clear in the law that that ex parte TRO is not a final judgment  
19 on the merits, and it does not provide the judicial imprimatur  
20 that's required by *Buckhannon* and *Cheyenne River*.

21 Thank you, Your Honor.

22 THE COURT: Thank you. I'm just thinking whether  
23 if I have any further questions for you, Mr. Williams, before I  
24 let Mr. Leach respond.

25 Mr. Leach, you may go ahead and give the reply

1 argument.

2 MR. LEACH: Sure. I think there are just three  
3 points that came up I would like to address.

4 Mr. Williams argued that not violating a temporary  
5 restraining order that one has agreed to extend is different  
6 than agreeing to a preliminary injunction, and I don't see how.  
7 They both bind the defendant to obey the stipulated temporary  
8 restraining order, just as a preliminary injunction does. The  
9 only thing that's different is the form of words that lawyers  
10 use to talk about the two. They don't have any different  
11 actual effect on the ground.

12 You asked a question about the possibility that I  
13 could have asked Ms. Rebecca Mann, who was the defense  
14 attorney at the time, about stipulating to preliminary  
15 injunction. There wasn't any discussion like that. I  
16 remember when her email came in saying they weren't going  
17 to challenge the temporary restraining order. They agreed to  
18 continue to obey it. It never occurred to me to say, *Well, that's*  
19 *not good enough. I won't rely upon your word, even though it's*  
20 *here in writing. I'm going to tell the Court that I want a hearing*  
21 *on an application for preliminary injunction.*

22 And I think she would have justly said *Why?* And I  
23 think the Court at some point would have justly said *Why?*  
24 And I just think that, you know, we're entitled to -- I mean, I  
25 think it was reasonable not to go forward, as opposed to

1 saying, *Well, I don't want you to be able to make an argument*  
2 *later that I don't get my attorney's fees so I'm going to insist on a*  
3 *hearing on a preliminary injunction.* I don't think that's a good  
4 way for lawyers to deal with the courts or other attorneys.

5 And then, finally, I want to push back on this  
6 argument that Mr. Williams made that this was *ex parte*. If  
7 you look at Document 36-1, it's the email that I sent to two  
8 state's attorneys for Lawrence County as soon as I filed this.

9 THE COURT: I hesitate to embrace that argument,  
10 Mr. Leach, knowing that the lawsuit was started, filed, on -- I  
11 think it was June 20.

12 MR. LEACH: Yes.

13 THE COURT: And the Temporary Restraining Order  
14 issued on June 22 at the end of the day. But, still, we're  
15 talking about 48 hours. And, yes, it's -- Lawrence County  
16 really is the defendant, the commissioners in their official  
17 capacity. And, yes, they have counsel who get notice that  
18 you're making the application. Rule 65(b) requires you to give  
19 notice. But it was *ex parte*. I didn't hear from anyone from  
20 Lawrence County before entering the Temporary Restraining  
21 Order. So I do think that initial Temporary Restraining Order  
22 entered June 22, 2023, has to be considered *ex parte*.

23 Now, I think your better argument is, well, they  
24 received notice of it. They agreed or stipulated -- maybe not  
25 stipulated in a formal sense -- but agreed to a 14-day

1 extension, and thereafter agreed to abide by it. So at that  
2 point perhaps it loses the ex parte flavor in that they've  
3 reviewed it and deemed to accept it. But Mr. Williams still has  
4 the argument, the judicial imprimatur, if you will, was on  
5 June 22, 2023. That's the ruling the Court made. At that  
6 point it does appear ex parte. *Common Cause Georgia v.*  
7 *Georgia*, perhaps there's a way of figuring out whether the  
8 hearing that's referenced in that decision was ex parte or not;  
9 but are you aware of any other decisions, where based on a  
10 temporary restraining order obtained ex parte, albeit one that  
11 doesn't freeze the status quo but rather provides the relief  
12 being sought by the plaintiff, justifies attorney's fees when  
13 there's no preliminary injunction or no other judgment that  
14 follows?

15 MR. LEACH: Well, I'm not. But I don't think those  
16 are our facts here, based on their agreement that the  
17 Temporary Restraining Order -- that they would follow it and  
18 that it stayed in effect for 110 days, became appealable,  
19 et cetera. So I think that's what completely takes this case  
20 out of the situation where all there was was a Temporary  
21 Restraining Order, which I would say still -- if that's all there  
22 was, we still have the judicially sanctioned material alteration,  
23 but we don't have to get to that difficulty.

24 THE COURT: All right. I hesitate to say this is a  
25 case of first impression. It just has unique facts that make it



1 a bit peculiar to fit into what really is fairly well-established  
2 law. The Supreme Court has had, in *Sole* and *Buckhannon*,  
3 opportunities to address what it means to be a prevailing  
4 party, and there is established Eighth Circuit law on that.  
5 But this is a unique set of circumstances to fit into that.

6 I appreciate counsel's argument. I am going to issue  
7 a written opinion and order. I want to cogitate on this a bit  
8 more. As you know, I can do quick with the temporary  
9 restraining order coming the day after the case was assigned,  
10 and I apologize for being slow here in reaching this decision.  
11 Obviously it doesn't have the sort of immediacy to it that an  
12 application for a temporary restraining order does, but I do  
13 intend to get a decision out reasonably soon. So the matter is  
14 taken under advisement.

15 Thank you all for your time and your argument.

16 MR. LEACH: Can I just leave you with a final  
17 thought?

18 THE COURT: I suppose, but I'll give Mr. Williams,  
19 then, an opportunity to leave me with his final thought.

20 Go ahead, Mr. Leach.

21 MR. LEACH: It's just that if your decision is on  
22 these facts that I don't get attorney's fees, next time I've got to  
23 bother you and say, *Judge, I need a hearing on a preliminary*  
24 *injunction, even though the defense says they're not going to*  
25 *challenge this.*

1 THE COURT: Oh, you're never a bother, Mr. Leach.  
2 Any final thought, Mr. Williams?

3 MR. WILLIAMS: Yeah, Your Honor. My final  
4 thought to that matter was Plaintiffs were well aware  
5 attorney's fees were in dispute even before they filed their  
6 motion to dismiss as mootness. It's in Document Number 25.  
7 It specifically says *This policy makes all issues moot except*  
8 *attorney's fees and costs.* The order issued by the Court says  
9 we're still disputing attorney's fees and costs. So the  
10 application of attorney's fees was never like a bait and switch.  
11 That has always been contended.

12 THE COURT: I understand the parties weren't  
13 negotiating -- or maybe they did discuss, *What about*  
14 *attorney's fees?* -- but there was no decision reached on  
15 attorney's fees. This issue is legitimately preserved by both  
16 parties. This isn't a bait and switch on the issue of attorney's  
17 fees. That never was agreed to -- maybe never even  
18 discussed -- but never agreed to when the defendant said *We'll*  
19 *not dispute extending the TRO 14 days. We'll not behave in a*  
20 *way that contravenes the TRO. Let's get on our way.* No. I  
21 don't think either party behaved in bad faith here, if that's  
22 what your implication is. No.

23 And I do actually appreciate that the parties were  
24 able to take a hard look at the case, perhaps aided by the  
25 opinion that I had issued on the Temporary Restraining Order,

1 and figure something out short of further litigation.

2 All right. The matter is under advisement. Court is  
3 adjourned.

4 (Proceedings concluded at 12:45 p.m.)  
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1 UNITED STATES DISTRICT COURT)  
2 DISTRICT OF SOUTH DAKOTA : SS CERTIFICATE OF REPORTER  
3 SOUTHERN DIVISION )

4 I, Carla Dedula, Official United States District Court  
5 Reporter, Registered Professional Reporter, Certified Realtime  
6 Reporter, and Notary Public, hereby certify that the above and  
7 foregoing transcript is the true, full, and complete transcript of  
8 the above-entitled case, consisting of pages 1 - 27.

9 I further certify that I am not a relative or employee or  
10 attorney or counsel of any of the parties hereto, nor a relative  
11 or employee of such attorney or counsel, nor do I have any  
12 interest in the outcome or events of the action.

13 IN TESTIMONY WHEREOF, I have hereto set my hand  
14 this 20th day of August, 2024.

15 

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